(2)

No. 90-676

Supreme Court, U.S.
FILED
NOV 21 1990
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1990

IN RE: HOLYWELL CORPORATION, et al.,

Debtors,

vs.

MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, HOLYWELL CORPORATION, CHOPIN ASSOCIATES, and THEODORE B. GOULD,

Petitioners,

vs.

THE BANK OF NEW YORK,

Respondent.

On Petition For Writ Of Certiorari to the United States Court Of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION OF RESPONDENT, THE BANK OF NEW YORK

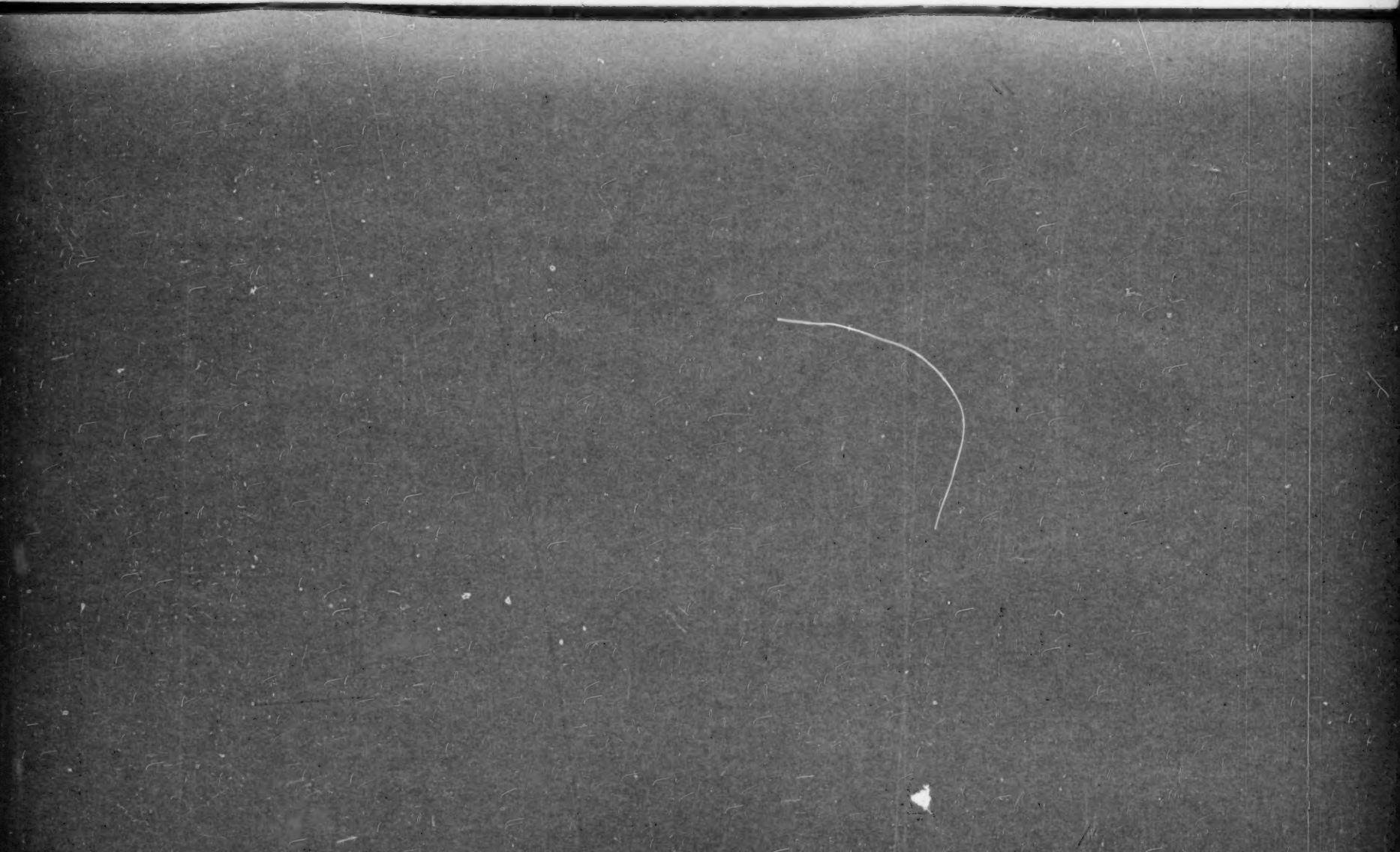
VANCE E. SALTER, ESQ.
MICHAEL J. HIGER, ESQ.
COLL DAVIDSON CARTER SMITH SALTER & BARKETT, P.A.
3200 Miami Center
201 S. Biscayne Boulevard
Miami, Florida 33131
Tel: (305) 373-5200
[*Counsel of Record*]

Of Counsel:

THOMAS F. NOONE, ESQ.
EMMET MARVIN & MARTIN
48 Wall Street
New York, New York 10286
Tel: (212) 422-2974

S. HARVEY ZIEGLER, ESQ.
KIRKPATRICK & LOCKHART
2000 Miami Center
201 South Biscayne Blvd.
Miami, Florida 33131
Tel: (305) 374-8112

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831



ISSUES PRESENTED

I.

Does this Court lack jurisdiction?

II.

Was the doctrine of mootness correctly applied by the lower courts to the facts of this case?

TABLE OF CONTENTS

TABLE OF CITATIONS

Page(s)

OPINIONS:

TABLE OF CITATIONS – Continued

TABLE OF CITATIONS – Continued

Page(s)

No. 90-676

In The

Supreme Court of the United States

October Term, 1990

IN RE: HOLYWELL CORPORATION, et al.,

Debtors,

vs.

MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, HOLYWELL CORPORATION, CHOPIN ASSOCIATES, and THEODORE B. GOULD,

Petitioners,

vs.

THE BANK OF NEW YORK,

Respondent.

On Petition For Writ Of Certiorari to the United States Court Of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION OF RESPONDENT, THE BANK OF NEW YORK

INTRODUCTION

These Petitioners are no strangers to this Court. The current petition is the sixth petition for writ of certiorari that these Petitioners have filed from appeals in the five

related bankruptcy cases. The Petitioners have also previously filed a petition for writ of mandamus. On all of these prior occasions, this Court has denied these petitions.[1]

Moreover, the Petitioners come to this Court after presenting the same frivolous arguments over the past five years to:

Two different bankruptcy judges;

Ten different district court judges in over 30 separate appeals; and

Eight judges of the United States Court of Appeals in over 20 separate appeals and in a petition for writs of prohibition and mandamus.

This Petition is particularly frivolous because the Petitioners raised almost the identical issue in a prior petition which this Court denied.[2]

STATEMENT OF THE CASE

The five affiliated debtors – Theodore Gould ("Gould"), Miami Center Limited Partnership ("MCLP"),

---

[1] Case Nos. 89-917, 89-864, 89-708, 88-80, 87-1989 and 87-1988. References to the Petitioners' Appendix will be denoted as "___ a," and references to the Appendix to this response are denoted "App. ___."

[2] *Miami Center Ltd. Partnership v. Bank of New York*, 838 F.2d 1547 (11th Cir.), *cert. denied*, 488 U.S. 1046 (1988) (Case No. 87-1988).

Holywell Corporation ("Holywell"), Miami Center Corporation ("MCC"), and Chopin Associates ("Chopin") all filed voluntary petitions in bankruptcy on August 22, 1984.[3] The bankruptcy cases initially were consolidated for joint administrative purposes, and the five debtor estates were later substantively consolidated by Order dated July 23, 1985.[4] Gould owned 100% of the stock of debtor, Holywell and also served as president and director of Holywell. In turn, Holywell owned 100% of the stock of debtor MCC, and Gould served as president and director of MCC. Gould and MCC were the sole general partners of debtor Chopin and of debtor MCLP. All five debtors were involved in developing the Miami Center Project, an office building and hotel complex in downtown Miami.

The Bank of New York (the "Bank")[5] was the lead construction lender for the Miami Center Project.

---

[3] For purposes of this Response, the Petitioners will also be referred to as the "debtors."

[4] Under the bankruptcy and equitable doctrine of "substantive consolidation," the assets and liabilities of related debtors are pooled, and inter-debtor obligations are eliminated.

[5] Pursuant to Supreme Court Rule 29.1, the following is a listing of the relationships of The Bank of New York:

(a) Parent of the Bank – The Bank of New York Company, Inc.

(b) "Affiliates" of The Bank are:

BNY Holdings (Delaware) Corporation
The Bank of New York (Delaware)
The Bank of New York Overseas Finance, N.C.
Affinity Group Marketing, Inc.

(Continued on following page)

Commencing in March of 1980, the Bank advanced to the debtors in excess of $196 million under the terms of a series of notes, mortgages and other loan documents. The loans were in default as of February 1, 1984, and the Bank commenced a state court foreclosure action in July of 1984. The debtors filed voluntary Chapter 11 proceedings on August 22, 1984.

The Bank commenced the adversary proceeding (which is the subject of this Petition) before the bankruptcy court (Adv. No. 85-0160-BKC-TCB-A) against all five debtors in order to establish the validity, amount, and priority of the Bank's mortgage lien encumbering the project. The Bank sought to liquidate its lien and to establish the validity of that lien as an essential element of a consolidated plan of reorganization proposed by the Bank. On August 8, 1985, the bankruptcy court confirmed that plan, as amended.

(Continued from previous page)

ARCS Mortgage Corp. (Fla.)
ARCS Mortgage, Inc. (Calif.)
BNY Leasing, Inc.
Eastern Trust Company
The Bank of New York Life Insurance Co., Inc.
Capital Trust Company
BNY Financial Corporation
BNY Personal Brokerage, Inc.
Beacon Capital Management
The Bank of New York Trust Company, Inc.
The Bank of New York Trust Company of California
The Bank of New York Trust Company of Florida, N.A.
Leonard Newman Agency, L.P.

The debtors sought to delay the trial of the Bank's lien priority proceeding by filing (a) a "Motion to Stay" only nine days before trial and, after losing that motion, (b) an "Emergency Motion for an Order of Withdrawal [of Reference]" in the district court, only two days before trial, which the district court also denied.

The debtors never served interrogatories or a request for admissions; never noticed any person or entity for deposition (although the Bank voluntarily (a) advised the debtors of the Bank witnesses who would be called at trial and (b) permitted the debtors to take pretrial depositions of those witnesses); and never filed a motion for continuance.

Before the bankruptcies, and for valuable consideration, the debtors had executed releases in favor of the Bank. The releases were signed on June 23, 1983 and on June 11, 1984. The debtors executed each release as part of agreements under which the debtors received from the Bank new consideration, including additional loans, forbearances, extensions of time for repayment, a conditional waiver of "default rate" interest, and the release of certain contingent profit participation rights upon the occurrence of specified conditions. Both releases related to all claims which any debtor then had or might have, or thereafter have, "in connection with, or arising out of, or otherwise relating to the Loans or the Loan Documents." The releases were not form or "boilerplate" releases; they were carefully drafted to include all claims relating to the dealings among the parties.[6]

---

[6] *In re Holywell Corp.*, 49 Bankr. 694 (Bankr. S.D. Fla. 1985).

At the time the debtors executed the releases, Gould and the debtors' counsel believed that certain contingent profit participation rights might constitute a basis for making a claim (whether or not valid) of usury under Florida law. App. 2-3. Thus, the debtors knowingly released any potential claim of usury when they executed the releases.

On January 29, 1985, the debtors filed a suit in the district court against the Bank (and its participants in the construction loan) alleging, among other things, that the 1984 release should be voided as a preferential transfer under 11 U.S.C. § 547(b).

On February 12, 1985 (over a month before the scheduled bankruptcy court trial), Gould testified candidly that the 1983 release might bar certain claims, even if the 1984 release was voided:

> A. [Mr. Gould]: The amended complaint will consist of a usury claim, a prime rate claim, interference – *if we can get past the 1983 release* concerning the construction – and those are fundamentally – in other words, the non-disturbance agreement, which clearly specifies in the mortgage documents, interference, *if we can establish it beyond the June 1983 release,* which affected the behavior in the period from September of 1980 to December of 1980 – actually, from August of 1980 to December of 1980 – and also their actions in April of 1981 and November 1981 when the third amendment to the construction contract was signed, and, as you are probably aware, at one point we were paying 22 and a half percent interest, in pure interest, not including fees, and of the $195,000,000 outstanding, $56,000,000 represents in [sic] interest.

App. 3-4 (emphasis added).

On February 20, 1985, the debtors filed an amended complaint in the district court, adding new claims for fraud, breach of contract, RICO violations (based on allegations of charging an improper rate of interest in excess of the prime rate of interest), and usury.

On March 11, 1985, the bankruptcy court heard the debtors' motion to stay the adversary proceeding. In open court, counsel for the Bank described the release issue to the bankruptcy court and the debtors:

> I think too, we have to winnow down what is in the District Court. There is one issue in the District Court that I don't believe Mr. Kent mentioned, and that is the issue of the validity of the general release which the debtors all gave to the bank. Now, that is a general release – there were two of them – there was one dated June of '83, that is not even contested. There is a June, '84 general release releasing the bank from all claims under the instruments and otherwise, and the debtors attack it on a preference basis; they say the giving of the release was a preference. That is a core issue, and if that issue is disposed of favorably to the bank, presto, all the debtors' other claims go away.
>
> We would urge this Court to hear that issue because it is a rather simple issue, it can be heard quickly, it can be heard at the trial that is set in this Court in a few days on the bank's complaint.

App. 6.

Counsel for the debtors agreed that the release question was a "core proceeding," but argued that the releases did not extend to RICO, fraud, and usury claims.

Debtors' counsel did not argue that the consideration for the releases was insufficient:

> MR. KENT: Two more quick points, your Honor: First of all, on the releases that Mr. Carter brought up, he stated that we did file, one of the counts is for a release and there is no question it is a core proceeding. However, he said that this also controls the other subsequent counts filed by the debtors in the U.S. District Court, and really I think this Court has jurisdiction over the subsequent counts except, as I said, Count IV.
>
> However, the releases do not apply to Count IV which is the RICO count, Count V which is fraud and Count VII which is usury because a release is like any other contract and you cannot contract to waive criminal acts or fraud or usury.

App. 8.

Tellingly, the debtors' counsel then assured the bankruptcy court that the release itself was not disputed:

> THE COURT: All right, I follow you. Your contention is that although the release itself is not disputed –
>
> MR. KENT: Yes, sir.
>
> THE COURT: – that the release's effect on these counts is seriously disputed?
>
> MR. KENT: And on one of the prior counts, yes, sir, Count III which is not, again, before this Court, it is just a count for damages.

App. 9.

The following day, the debtors (a) filed an emergency motion for withdrawal of reference in the district court,

(b) filed a Second Amended Complaint in the district court *dropping* the attack upon the 1984 release, and (c) took the depositions of the Bank's witnesses. At the deposition of James A. Hamilton, the Bank's Vice President, the following stipulation between counsel occurred on the record:

> MR. ZIEGLER: It was my understanding that you stipulated in open court and at Mr. Schumacher's deposition as to solvency on June 11, 1984, of the debtor, which reflects on Count II being dropped from the Complaint to be drafted, and that you are not contesting the June, 1983 release at this time.
>
> MR. KENT: That's correct.
>
> MR. ZIEGLER: You are not contesting the June, 1983 release, period.
>
> MR. KENT: Not at this time.
>
> MR. ZIEGLER: Right.

App. 12.

The next day (March 13, 1985), the Bank delivered to the debtors its trial brief for the trial the following day. The trial brief included copies of the 1983 and 1984 releases and authorities and argument respecting the scope of the releases. In addition, the parties argued the debtors' "Emergency Motion for Order of Withdrawal [of Reference]" before the district court. The Bank's memorandum addressed to that motion discussed the releases in detail, and counsel for the debtors raised no issue or claim that the releases were inapplicable. The district court denied the emergency motion, permitting the trial to go forward.

At the time scheduled for trial, counsel for the debtors again argued to the bankruptcy court that the releases could not apply, as a matter of law, to the debtors' usury, fraud, and RICO claims. The debtors did not offer a single witness or document to show that the releases were void for lack of consideration, nor did they request additional time to present evidence on that issue.

The debtors offered no evidence regarding the sums of principal and interest claimed by the Bank in its complaint in the adversary proceeding.

On March 19, 1985, five days after the final hearing in the adversary proceeding, the debtors filed a memorandum of law on the release question. In that memorandum, the debtors added a new argument (contravening debtors' counsel's advice to the district court and to the Bank's lawyers on March 11 and 12), asserting that the releases failed for lack of consideration. The bankruptcy court rejected that argument in its Memorandum Decision entered the following day. *Holywell*, 49 Bankr. 694.

On March 29, 1985, the debtors filed a motion for rehearing. Again, the debtors did not seek to offer evidence with respect to the interest computations set forth in the final judgment on the mortgage debt. The district court denied that motion on April 10, 1985. App. 13. The debtors appealed the bankruptcy court's judgment determining the amount, validity, and extent of liens of the Bank and the bankruptcy court's denial of their motion for rehearing to the district court. The debtors never sought to stay the effect of the final judgment entered by the bankruptcy court during the pendency of their appeal. After the issues on appeal were fully briefed, the

district court, upon the Bank's motion, dismissed the debtors' appeal as moot. 9a.

The debtors appealed the dismissal to the Eleventh Circuit. The Eleventh Circuit affirmed the dismissal of the debtors' appeal as moot and further determined that the debtors' other contentions were meritless. 8a.

ARGUMENTS AGAINST GRANTING THE WRIT

Through the commencement over the past five years of over 50 appeals from bankruptcy and district court orders and seven petitions for review by this Court, the debtors have consistently ignored prior rulings and have attempted to systematically dismantle the confirmed and substantially consummated Plan. This Court and the courts below have uniformly denied these frivolous attempts. This Petition marks the first time that these debtors have now embarked on a course of ignoring the prior decisions of this Court. *See Miami Center Ltd. Partnership v. Bank of New York*, 488 U.S. 823 (1988). This Court should not countenance such a flagrant disregard for its decisions.

The evidentiary findings below as to substantial consummation and mootness are intensely factual, discretionary matters that are inappropriate for resolution by this Court. This Court does not grant certiorari to review evidence and discuss specified facts. *United States v. Johnston*, 268 U.S. 220, 227 (1925).

I.

LACK OF JURISDICTION

A. The Petition is Moot

The debtors are again clamoring for the return of something the Bank specifically bargained for in the Plan. This Court, however, previously denied the debtors' petition for writ of certiorari on the precise mootness issue now before it in this Petition. *Miami Center Ltd. Partnership v. Bank of New York*, 488 U.S. 823 (1988).[7]

The debtors argue as they did previously that the Eleventh Circuit misapplied the mootness standard. This Court, however, denied certiorari jurisdiction after considering that argument. *Id.* The debtors' failure to obtain a stay pending review of the confirmation order rendered moot any objections to the Bank's interest calculations, because those calculations were a material element of the confirmed plan of reorganization.

---

[7] This Court has consistently denied certiorari jurisdiction where the court below held that the action, in whole or in part, was moot. *See, e.g., United States v. Local 30, United Slate, Tile and Composition Roofers, Damp and Waterproof Workers Ass'n*, 871 F.2d 401 (3d Cir.), *cert. denied*, 110 S. Ct. 363 (1989); *Cotton v. Mansour*, 863 F.2d 1241 (6th Cir. 1988), *cert. denied*, 110 S. Ct. 835 (1990); *Folkstone Maritime, Ltd. v. CSX Corp.*, 866 F.2d 955 (7th Cir.), *cert. denied*, 110 S. Ct. 60 (1989); *Tyler v. Black*, 865 F.2d 181 (8th Cir.), *cert. denied*, 109 S. Ct. 1760 (1989); *Spears v. Thigpen*, 846 F.2d 1327 (11th Cir. 1988), *cert. denied*, 488 U.S. 1046 (1989); *Sun-Tek Indus., Inc. v. Kennedy Sky Lites, Inc.*, 848 F.2d 179 (Fed. Cir. 1988), *cert. denied*, 488 U.S. 1009 (1989).

This Court[8] and the federal circuits have consistently and uniformly held that a debtor's failure to obtain a stay pending appeal renders an appeal moot after a plan has been substantially consummated. *In re AOV Industries, Inc.*, 792 F.2d 1140 (D.C. Cir. 1986); *In re Sewanee Land, Coal & Cattle, Inc.*, 735 F.2d 1294 (11th Cir. 1984); *In re Roberts Farms, Inc.*, 652 F.2d 793 (9th Cir. 1981). "In this situation the mootness doctrine promotes an important policy of bankruptcy law – that court-approved reorganizations be able to go forward in reliance on such approval unless a stay has been obtained." *In re Information Dialogues, Inc.*, 662 F.2d 475, 477 (8th Cir. 1981). Moreover, the implementation of a confirmed plan irrevocably changes the positions and rights of the parties. It is these changes in circumstances and the creditors' reliance on a confirmed plan that make it impossible to fashion a remedy that would restore the interested parties to their former positions.

B. The Debtors Have Failed To Establish An Appropriate Basis For This Court's Certiorari Jurisdiction

The debtors argue that this Court has jurisdiction by virtue of the existence of a conflict between the Eleventh

---

[8] This Court regularly denies review of mootness determinations because they, "require a case-by-case judgment regarding the feasibility or futility of effective relief." *In re AOV Industries, Inc.*, 792 F.2d 1140, 1147-48 (D.C. Cir. 1986). This Court articulated the mootness standard that controls the instant case nearly a century ago. *Mills v. Green*, 159 U.S. 651, 653 (1895). The rule is just as vital today.

and several of the other courts of appeal as to the appropriate mootness standard. (Petition, pp. 15-23). Notwithstanding the debtors' far reaching attempts to manufacture a basis for this Court's jurisdiction, it is apparent (as outlined in more detail below) that there is no conflict or important question of federal law to be resolved by this Court. Sup. Ct. R. 10.1.

II.

THE COURT OF APPEALS CORRECTLY APPLIED THE MOOTNESS DOCTRINE

The debtors have focused their attack on the mootness standard set forth in *Miami Center Ltd. Partnership v. Bank of New York*, 838 F.2d 1547 (11th Cir.), *cert. denied*, 488 U.S. 823 (1988). The debtors raise the same arguments in this Petition that they raised unsuccessfully in their earlier petition. Accordingly, for the same reasons that this Court previously denied the debtors' prior petition for writ of certiorari, this Court should again deny this Petition.

The application of the mootness doctrine in a given case is particularly fact-driven. Individual decisions turn on the specific details of the confirmed plan of reorganization, the degree to which that plan has been implemented, the positions of the various parties to the proceedings, and the ability of a court to fashion "effective relief." This Court does not grant certiorari to review evidentiary matters, particularly where two courts below have concurred in the findings of facts. *Rogers v. Lodge*, 458 U.S. 613, 623 (1982).

The Eleventh Circuit in the prior decision with which these debtors again take issue noted that the district court had made:

> [D]etailed findings that the plan was fair, feasible, and that it had been substantially consummated. And it included the finding that it was *legally and practically impossible to unwind the confirmation of the plan or otherwise restore the status quo.*

Id. at 1554 (emphasis added). All of the administrative claims have been paid or reserved; secured claims have been paid in full; class 3 claims have been paid in full; undisputed claims in classes 4 through 6 have been paid in full and funds reserved for disputed claims; several disputed claims have been compromised; and there remain sufficient funds for the satisfaction, in full or in part, of the debtors' claims. *Id.* at 1552. Further, the Miami Center Project was sold over five years ago to the Bank's designee and is now under new ownership. Pursuant to the Plan, the Bank advanced millions of dollars in new cash above the mortgage balance, and the Bank released to the Liquidating Trustee over $30 million in cash collateral. That money has since been used to pay hundreds of creditors, who would not willingly disgorge the amounts received.

Moreover, the court below aptly noted:

> The plan of reorganization was adopted under the assumption that the Bank would be permitted to rely upon the amount of interest the bankruptcy court found to be correct. There is no indication that the Bank would have agreed to purchase the project for $255,600,000 if it had realized it might subsequently be required to repay millions of dollars of excess

> interest to the debtors. It might be true that the notes called for a lower interest rate than that accepted by the bankruptcy court. However, the amount of the judgment lien was calculated using that interest rate, and the purchase price of the property was funded in substantial part by elimination of the mortgage lien. Altering the amount of interest would change the amount of the judgment lien, which in turn would modify the terms of the sale to the Bank, to which the Bank agreed.

In re Holywell Corp., 901 F.2d 931, 933 (11th Cir. 1990); 5-6a. Further, the court below noted that the debtors' efforts to again require the Bank to "sweeten the pot" after the plan was implemented and substantially consummated must fail. 901 F.2d at 933-34; 6-8a.

The prior opinion of the Eleventh Circuit and the Opinion from which review is now sought are totally consistent with the long line of precedent requiring Article III Courts to decide actual controversies by a judgement which can be carried into effect, and not to give advisory opinions on moot questions. *Mills v. Green*, 159 U.S. 651, 653 (1895). Accordingly, this Court and the federal circuits have consistently and uniformly held that a debtor's failure to obtain a stay pending appeal renders an appeal moot after a plan of reorganization has been substantially implemented. "In this situation, the mootness doctrine promotes an important policy of bankruptcy law – that court-appointed reorganizations be able to go forward in reliance on such approval unless a stay has been obtained." *In re Information Dialogues, Inc.*, 662 F.2d 475, 477 (8th Cir. 1981). Moreover, the Ninth Circuit Court of Appeals in *In re Roberts Farms, Inc.*, 652 F.2d 793, 796 (9th Cir. 1981) opined that "[i]n the field of the

administration of estates under the bankruptcy laws, the policy of the law strongly supports a requirement that a stay be obtained if review on appeal is not to be foreclosed because of mootness." The implementation of a confirmed plan forever changes the positions and rights of the parties. It is these changes in circumstances and the creditors' reliance on a confirmed plan that make it impossible to fashion a remedy that would restore the interested parties to their former positions.

In light of this general rule and the underlying policy in favor of finality, the debtors (as they did previously in their petition in Case No. 87-1988) have again strained to create a conflict among the circuits or a conflict between the decision of the Eleventh Circuit and the decision of this Court. The decision below, however, is wholly consistent with the decisions of this Court and of other federal circuits. There is one harmonious theme throughout the opinions of this Court, the Eleventh Circuit, and the other federal circuits – where it is impossible to fashion a remedy that would restore the interested parties to their former positions, it is inequitable to consider the merits of the appeal.

The debtors have again erroneously relied on the Ninth Circuit Court of Appeals' decision in *In re Sun Valley Ranches, Inc.*, 823 F.2d 1373 (9th Cir. 1987) in their attempt to create a conflict among the circuits. The debtors have misconstrued the holding of that court by narrowly focusing on the language of the *Sun Valley* court that an exception to the general rule of mootness exists where real property is sold to a creditor who is a party to the appeal. *Id.* at 1375; Petition, pages 19-20. This myopic

reading of the *Sun Valley* decision does violence to the principles of mootness and finality.

A careful review of the *Sun Valley* decision, other decisions of the Ninth Circuit, and decisions of the other federal circuits indicates that *Sun Valley* is fully consistent with the established principles of mootness. The "narrow exception" set forth by the Ninth Circuit in *Sun Valley* is just a corollary of the general rule that where there are changes in circumstances which make it impossible to fashion a remedy that would restore the interested parties to their former positions, it would be inequitable to consider the merits of the appeal. In *Sun Valley*, the creditor's purchase of the real property was subject to the debtor's statutory right of redemption. This additional factor accounts for the "narrow exception."

The Ninth Circuit in *Sun Valley* did not establish a *per se* rule that an exception exists where the real property is sold to a creditor who is a party to the appeal. Instead, the Ninth Circuit followed the general rule that where it is possible to fashion an effective remedy, an Article III Court will consider the merits of the appeal. The possibility of fashioning a remedy existed in *Sun Valley*, because the creditor's purchase was subject to the debtor's statutory right of redemption. This statutory right of redemption is not a factor in this case, nor was it a factor in the decisions relied upon by the Court below in holding that the debtors' appeal should be dismissed as moot.

The court in *Sun Valley* plainly recognized the limitations of its holding:

> This exception to the rule is especially appropriate here, where the foreclosure sale is subject to statutory rights of redemption. Where the assets sold were shares of stock, we said that "the fact that the purchaser is a party to [an] appeal does not change the applicability of the mootness rule."

Id. (quoting *Algeran, Inc. v. Advance Ross Corp.*, 759 F.2d 1421, 1424 (9th Cir. 1985)). Therefore, the fact that the purchaser is a party to the appeal is no more than a factor to be considered in determining whether it is possible to fashion a remedy.

This limitation is evident from the Ninth Circuit's citation with approval in *Algeran* of the Eleventh Circuit's decision in *In re Sewanee Land, Coal & Cattle, Inc.*, 735 F.2d 1294, 1296 (11th Cir. 1984). *Algeran*, 759 F.2d at 1424. The *Algeran* court specifically cites *Sewanee* as support for "the fact that the purchaser is a party to the appeal does not change the applicability of the mootness rule."[9] *Id.* The Ninth Circuit's statement in *Sun Valley* that it would not follow the position of the Eleventh Circuit is based upon a stated perception that the Eleventh Circuit has adopted a *per se* refusal to consider the fact that the purchaser is a party to the appeal. The Eleventh Circuit, in *Sewanee*, however, did not articulate such a *per se* rule. Rather, the court, in *Sewanee*, recognized that "[i]n *some* situations, failure to obtain a stay pending appeal will render the

---

[9] The Ninth Circuit in *In re Worcester*, 811 F.2d 1224, 1228 (9th Cir. 1987) noted that in *Algeran* the Ninth Circuit adopted "the Eleventh Circuit's approach as to when a stay pending appeal is required in order to prevent mootness." This is hardly the language of a court disagreeing with one of its sister courts.

case moot." *Sewanee*, 735 F.2d at 1295 (emphasis added). Thus, despite Petitioners' assertion, the Eleventh Circuit has not adopted a *per se* application of the mootness doctrine, and an "irreconcilable conflict" does *not* exist as a result of the Ninth Circuit's decision in *Sun Valley*.

The debtors next cite the Fifth Circuit's decision in *In re Latham*, 823 F.2d 108 (5th Cir. 1987) for the proposition that "[s]atisfaction of a judgment does not moot the appeal unless the defendant-appellant voluntarily satisfies the judgment, thereby misleading the plaintiff into believing the controversy has ended." *Id.* at 111; Petition, page 20. The debtors, however, ignore the fact that the *Latham* case involved a single asset bankruptcy; and thus that court had no difficulty in returning the parties to their prior position. Likewise, the debtors' citations of this Court's decisions in *Cahill v. New York, New Haven & Hartford R.R.*, 351 U.S. 183 (1956) and *Mancusi v. Stubbs*, 408 U.S. 204 (1972) are readily distinguishable. The decision in *Cahill* involved an award of money damages, and the decision in *Mancusi* involved the sentencing of a criminal defendant. As a result, the particular facts of these decisions permitted the restoration of the parties to their former positions. This is in stark contrast with the facts in this case where it is "now impossible and unjust to amend the plan as consummated, and [the Court is] unable to fashion effective relief for all concerned." *Holywell Corp.*, 901 F.2d at 934; 8a.

The debtors' citation of *In re King Resources Co.*, 651 F.2d 1326 (10th Cir. 1980) is also inapplicable to the facts in this case. The *King Resources* Court held that if the "effect of reversal on appeal would be to order the impossible, we would not address the merits of the appeal."

King Resources, 651 F.2d at 1332. Unlike the record before the court below, the court in *King Resources* was unable to conclude on the record before it that the claim of substantial consummation had been clearly established. *Id.* Notwithstanding the issue of mootness, the court in *King Resources* ultimately affirmed the district court's decision. *Id.* at 1332, 1341.

Similarly, the Ninth Circuit's decision in *In re Technical Knockout Graphics, Inc.*, 833 F.2d 797 (9th Cir. 1987) does not present a conflict. The basis for that court's holding is that despite the confirmation of the plan, it was still possible to fashion a remedy that would restore the interested parties to their former positions. In that case, a remedy was available because the only concern was the allocation of funds to pay differing tax liabilities to the IRS. That decision is consistent with the Eleventh Circuit opinion in this matter.

Further, the debtors' reliance on *In re Atlas Sewing Centers, Inc.*, 384 F.2d 66 (5th Cir. 1967) as providing a basis for a conflict is also misplaced. The court in *Atlas* took issue with whether the plan of reorganization in that case had been substantially consummated. Plainly, there is no issue in this case that the plan has been substantially consummated.

This Court has acted consistently to limit and control the burgeoning workload of the federal court system. The mootness doctrine in bankruptcy cases is a significant element of that effort. Bankruptcy decisions already enjoy a second level of appellate review in the federal system. For the sake of creditors, the litigants, and the federal system, a confirmed bankruptcy plan of reorganization

must not be kept under an appellate sword of Damocles for the entire duration of the appellate process. When debtors fail to post a bond as required, the parties should be allowed to consummate the plan and change positions in reliance upon the law of that case at that time.

To hold otherwise, as the debtors apparently urge, is to paralyze the ability of the bankruptcy courts to oversee and conclude reorganization cases.

Finally, the releases ruled upon by the bankruptcy court clearly barred the frivolous lawsuit referred to by the Petitioners, further obliterating any hope that the debtors could prevail even if the appeal below had not been dismissed as moot. *Holywell*, 49 Bankr. 694.

CONCLUSION

For all the foregoing reasons, this Court should deny the debtors' petition for writ of certiorari.

Respectfully submitted,

S. HARVEY ZIEGLER, ESQ.
KIRKPATRICK & LOCKHART
2000 Miami Center
201 S. Biscayne Bld.
Miami, Florida 33131
Tel: (305) 374-8112

COLL DAVIDSON CARTER SMITH
SALTER & BARKETT, P.A.
3200 Miami Center
201 S. Biscayne Boulevard
Miami, Florida 33131
Tel: (305) 373-5200

By _____
Vance E. Salter

By _____
Michael J. Higer

Of Counsel:

THOMAS F. NOONE, ESQ.
EMMET MARVIN & MARTIN
48 Wall Street
New York, New York
10286
Tel: (212) 422-2974

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 26th day of November, 1990, a true and correct copy of the foregoing was mailed by first class, postage paid, U.S. mail to:

ROBERT M. MUSSELMAN, ESQ.
MUSSELMAN & ASSOCIATES
413 Seventh Street, N.E.
Charlottesville, Virginia 22901
Telephone: (804) 977-4500

THEODORE B. GOULD, *pro se*
2565 Ivy Road
Charlottesville, Virginia 22901
Telephone: (804) 295-7125

/s/
MICHAEL J. HIGER

No. 90-676

In The

Supreme Court of the United States

October Term, 1990

IN RE: HOLYWELL CORPORATION, et al.,

Debtors,

vs.

MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, HOLYWELL CORPORATION, CHOPIN ASSOCIATES, and THEODORE B. GOULD,

Petitioners,

vs.

THE BANK OF NEW YORK,

Respondent.

On Petition For Writ Of Certiorari to the United States Court Of Appeals for the Eleventh Circuit

APPENDIX TO BRIEF IN OPPOSITION OF RESPONDENT, THE BANK OF NEW YORK

INDEX TO APPENDIX

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

PROCEEDINGS IN CHAPTER 11

IN RE:	:	Case No: 84-01590-BKC-TCB
MIAMI CENTER CORPORATION,	:	Case No: 84-01591-BKC-TCB
Debtor.	:	Case No: 84-01592-BKC-TCB
	:	Case No: 84-01593-BKC-TCB
	:	Case No: 84-01594-BKC-TCB

1200 Brickell Avenue,
Miami, Florida,
Monday, 9:48 a.m.,
February 11, 1985.

DEPOSITION

of

THEODORE B. GOULD

taken on behalf of the Committee of Unsecured Creditors of Miami Center Limited Partnership

pursuant to Bankruptcy Rules 2004 and 9016

* * *

[p. 162] executed on the 14th day of October, 1983, in connection with this Amendment No. 1 – were they all reviewed by Cadwalader, Wickersham and Taft?

A. Yes.

Q. They had familiarity with the transaction?

A. Yes.

Q. Did they, during their review, ever express any dissatisfaction with the basic underlying documents, the mortgages? Did they ever state in writing or orally that there were some deficiencies in the security or some deficiencies in the rate of interest or anything?

A. Yes. You will find a participation agreement that was entered into at the time that the Metropolitan Life Insurance Company had informally indicated that they would increase their loan by $24,000,000, and also the Bankers Life had indicated it would increase its loan by $8,000,000.

Q. Informally or formally?

A. Initially, it was informal. The banks demanded a participation agreement of one percent of each million dollars in additional loans made, to which we objected, and Cadwalader, Wickersham and Taft informed me informally that, in their opinion, the participation agreement was usurious and made the loan documents of the Bank of New York usurious.

Q. Just by that request for the one percent?

[p. 163] A. They got it. They demanded it and they received it.

Q. When did they receive it?

A. I think it was in may of 1982, and subsequently Cadwalader, Wickersham and Taft wrote letters to the Bank of New York stating our opinion concerning the

participation agreement, and the bank refused to void that agreement. They have now made a claim under it.

Q. Did Cadwalader, Wickersham and Taft rely upon Florida law?

A. Yes.

Q. Did they tell you the statutes that they relied upon?

A. No.

Q. When to the best of your recollections, was this claim of usury made?

A. I don't think that they made a claim of usury directly to the bank. They told me that there was usury.

Q. I am talking about you.

A. I would think about the same time that the bank refused to void the participation agreement.

Q. When was that, to the best of your recollection?

A. Some time in 1982.

Q. In 1982?

A. Yes. We continued to ask them to avoid the

* * *

[p. 180] know you are not a lawyer, but you know more about this than anybody factually. I am not holding your lawyers to pleading what you are going to say now.

A. The amended complaint will consist of usury claim, a prime rate claim, interference – If we can get past

the 1983 release concerning the construction – and those are fundamentally – in other words, the non-disturbance agreement, which clearly specifies in the mortgage documents, interference, if we can establish it beyond the June 1983 release, which affected the behavior in the period from September of 1980 to December of 1980 – actually, from August of 1980 to December of 1980 – and also their actions in April of 1981 and November of 1981 when the third amendment to the construction contract was signed, and, as you are probably aware, at one point we were paying 22 and a half percent interest, in pure interest, not including fees, and of the $195,000,000 outstanding, $56,000,000 represents in [sic] interest.

If you take their claim of 67 percent of the equity value, positive cash flow, refinancing or the sales value of the property there as additional interest, that would put them well above 25 percent. Of course, there is the time rate case to be made, in other words, in which I understand we haave [sic] a very good claim.

Q. Did any attorney in the Cadwalader firm give any input into this position that you now maintain?

* * *

App. 5

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Judge Thomas C. Britton

In the Matter of HOLYWELL CORPORATION, Debtor.	No. 84-01590

MOTION FOR STAY PENDING APPEAL

March 11, 1985

The above-entitled cause came on for Hearing before the Honorable Thomas C. Britton, one of the Judges of the United States Bankruptcy Court, Room 1406, 51 Southwest 1st Avenue, Miami, Dade County, Florida, at a session of said Court commencing at 10:30 o'clock a.m. on Monday, March 11, 1985, and the following proceedings were had:

Reported By: Janice Mauldin

* * *

[p. 13] that the case has.

As far as the amount, validity and priority of the bank's lien, that is a core issue. I don't think there is any serious question but that it is a core issue. This is the kind of issue that Bankruptcy Courts rule on. We filed it here.

When they brought us into this Court, when they scheduled our claim as disputed, they forced us to file a proof of claim. They have vigorously said, "We don't owe

that much money," so we brought the issue to a head. If you will remember, we had tried to do it on a motion earlier and that was objected to on the cash collateral issue, and your Honor said, "File a complaint." We filed our complaint.

I think, too, we have to winnow down what is in the District Court. There is one issue in the District Court that I don't believe Mr. Kent mentioned, and that is the issue of the validity of the general release which the debtors all gave to the bank. Now, that is a general release – there were two of them – there was one dated June of '83, that is not even contested. There is a June, '84, general release releasing the bank from all claims under the instruments and otherwise, and the debtors attack it on a preference basis; they say the giving of the release was a preference. [p. 14] That is a core issue, and if that issue is disposed of favorably to the Bank, presto, all the debtors' other claims go away.

We would urge this Court to hear that issue because it is a rather simple issue, it can be heard quickly, it can be heard at the trial that is set in this Court in a few days on the bank's complaint.

THE COURT: When was the trial set?

MR. CARTER: The 14th, your Honor, on the validity of the bank's lien, it is set for this very week and, indeed, the debtors have answered, while moving to stay they have timely answered and they have raised certain affirmative defenses, but in response to those affirmative defenses I will tell the Court we are going to put in evidence those general releases, only one of which is contested, and that really should put the matter to rest.

The other thing that I think undercuts the debtor's position that the bank should be stayed in determining its lien, the subordination issue, as I said, is set – it is the debtor's subordination, it is styled an application – it is set before this Court on the 29th of April. We are not going to trial in the District Court before the 29th of April, your Honor. Those same issues are raised, I believe, with the

* * *

[p. 28] The bank is going to bid its lien, put up another $22 million, close on a date certain in the near future –

THE COURT: I see.

MR. CARTER: – and it is going to buy the building and it is going to buy the causes of action.

THE COURT: I see. It is going to buy everything except Mr. Kent?

MR. WOLFF: Him, too because –

THE COURT: Him, too?

MR. WOLFF: – it provides for the payment of his administrative fees and the debtors-in-possession –

(Laughter)

THE COURT: I follow you.

MR. CARTER: We are wrapping it up in a ball and I think you can understand why we are going to do that, your Honor.

THE COURT: Okay, I do follow.

Mr. Kent, forgive me for interrupting you, let me shut up and listen now.

MR. KENT: Two more quick points, your Honor: First of all, on the releases that Mr. Carter brought up, he stated that we did file, one of the [p. 29] counts is for a release and there is no question it is a core proceeding. However, he said that this also controls the other subsequent counts filed by the debtors in the U.S. District Court, and really I think this Court has jurisdiction over the subsequent counts except, as I said, Count IV.

However, the releases do not apply to Count IV which is the RICO count, Count V which is fraud and Count VII which is usury because a release is like any other contract and you cannot contract to waive criminal acts or fraud or usury.

I have some Florida law on it. I just got notice of this last night. One of them is right here out of Miami, Indianopolis [sic] Morris Plant Corporation against Portella, it is a 1978 decision in the Third District Court of Appeals, which, in effect, says that –

THE COURT: Give me the Southern 2d?

MR. KENT: 364 So. 2d 840.

In addition, as I said, we were in somewhat of a hurry, but Florida Jurisprudence 2d which is at 10 Florida Jurisprudence 2d, commencing at Page 37, it is Section 28, compromise in a court and release, starting there, it states that, in effect, we are talking about a contract and that –

THE COURT: The release is inoperative [p. 30] as to the criminal –

MR. KENT: Criminal acts or acts against public policy, fraud and usury, those three.

THE COURT: Your pending action, of course, and we are talking now about Count V, VI –

MR. KENT: IV, V and VII.

THE COURT: – IV, V and VII.

MR. KENT: Yes. Count VI is a breach of contract.

THE COURT: They are not criminal counts, of course. Rather, they are counts, I take it, for the civil remedy arising out of a criminal statute; is that what we are talking about?

MR. KENT: I believe so, as far as Count IV goes. Count V, of course, is a count of fraud. Count VII which is usury, criminal usury, I haven't researched this and I wasn't privy to the research done on it, but the case I cited to the Court just a moment ago involves –

THE COURT: The Third District case?

MR. KENT: Yes, sir. – involves civil usury.

THE COURT: All right, I follow you. Your contention is that although the release itself is not disputed –

[p. 31] MR. KENT: Yes, sir.

THE COURT: – that the release's effect of these counts is seriously disputed?

MR. KENT: And on one of the prior counts, yes, sir, Count III, which is not, again, before this Court, it is just a count for damages.

THE COURT: Sounding in what kind of theory is Count III?

MR. KENT: Well, it is being amended, quite frankly, because, as it reads now, it is a preference. However, by the definition of solvency, the debtor was solvent at the time, so it also alleges inadequate or no consideration and it is being amended to go straight to failure of consideration or no consideration, so it would be a count – and Count II would be dismissed, it is being withdrawn completely, so that count on the preference is being withdrawn and we are pleading it as one would where they would have to come in for – we are acknowledging the release and it would be failure of consideration or no consideration. However, that hasn't even been filed yet.

The final thing is, your Honor, again, under the cases cited by Mr. Carter, I have no quarrel with, they are silent as to Section 157(d) which I

* * *

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

In Re:	)	Case Nos.
HOLYWELL CORPORATION, et al.,	)	84-01590
	)	84-01591
Debtors.	)	84-01592
	)	84-01593
	)	84-01594
THE BANK OF NEW YORK, a New York Banking Corp.,	)	
	)	
Plaintiff,	)	ADVERSARY
	)	NUMBER
-vs-	)	85-0160-
THEODORE GOULD, et al.,	)	BKC-TCB-A
	)	
Defendants.	)	
	)	

S.E. Financial Center
Miami, Florida
Tuesday, 9:55 a.m.
March 12, 1985

DEPOSITION

of

JAMES A. HAMILTON

Taken on behalf of the Debtor
pursuant to Notice of Taking Deposition

---

* * *

[p. 4] therein and any defenses or claims or counterclaims in regard to those two nondisturbance counts.

MR. KENT: Right.

MR. ZIEGLER: It was my understanding that you stipulated in open court and at Mr. Schumacher's deposition as to solvency on June 11, 1984, of the debtor, which reflects on Count II being dropped from the Complaint to be drafted, and that you are not contesting the June, 1983 release at this time.

MR. KENT: That's correct.

MR. ZIEGLER: You are not contesting the June, 1983 release, period.

MR. KENT: Not at this time.

MR. ZIEGLER: Right.

We have acknowledged in your Answer to the Amended Complaint that you admitted the execution and authenticity of the notes and mortgages. You have admitted the perfection of the security interest therein.

We have agreed that, subject to all of your affirmative defenses and evidence and records, the allegations of your Federal Complaint in whatever final form it achieves, that all of those exist, but you do not disagree and admit that, if

* * *

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

In Re:	Case Nos.
HOLYWELL CORPORATION, et al.	84-01590-BKC-TCB 84-01591-BKC-TCB 84-01592-BKC-TCB 84-01593-BKC-TCB 84-01594-BKC-TCB
THE BANK OF NEW YORK, Plaintiff,	ADV. No. 85-0160-BKC-TCB-A
vs.	
CHOPIN ASSOCIATES, and MIAMI CENTER LIMITED PARTNERSHIP, Defendants.	

ORDER DENYING DEFENDANTS' MOTION FOR REHEARING AND RECONSIDERATION

THIS MATTER came before the Court for hearing on April 8, 1985 upon the Debtor/defendants' Motion for Rehearing and Reconsideration of a Memorandum Decision and Judgment entered March 20, 1985.

The Court has considered the Motion, the argument of counsel presented at the hearing, and the authorities cited by counsel for the parties.

The Court also offered the defendants the opportunity to put on the record the testimony of the principal officer of the defendants, Theodore B. Gould, but the defendants elected not to do so.

Based upon the foregoing, the Court has not been persuaded that it should amend or recede from the Memorandum Decision or Judgment previously entered. Accordingly, it is

ORDERED that the Motion for Rehearing the Reconsideration is denied.

DONE AND ORDERED this 10th day of April, 1985.

THOMAS C. BRITTON
~~THOMAS C. BRITTON~~
UNITED STATES BANKRUPTCY JUDGE

Copies furnished to:
Fred H. Kent, Jr., Esq.
S. Harvey Ziegler, Esq.
Francis L. Carter, Esq.
Irving Wolff, Esq.